Supreme Court, U.S.
FILED

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No. 98 877

In The

Supreme Court of the United States

October Term, 1998

MORRIS MYERS,

Petitioner,

versus

THIRD JUDICIAL DISTRICT COURT of SALT LAKE COUNTY, STATE OF UTAH, and WILLIAM B. BOHLING, a judge of said last named court, and MUTUAL MORTGAGE SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MORRIS MYERS, Petitioner
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801-268-0542

45pp

QUESTION PRESENTED FOR REVIEW

In this 42 USC § 1983 action for declaratory relief against a Utah trial judge in which the claim is that an act or omission taken in the judge's judicial capacity deprived petitioner of Due Process of Law under the 14th Amendment [29 USC § 1343(a)(3); *Pulliam v. Allen*, 406 US 522, 80 LEd 565, 104 SCt 1790 (1984)], was the district court's subject matter jurisdiction affected by Rooker-Feldman [28 USC § 1257] where there was no final judgment or decree rendered by the Supreme Court of Utah in the judicial proceedings in which it is alleged the deprivation occurred.

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PETITION FOR WRIT OF CERTIORARI

Morris Myers petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit, which affirmed the decision of the United States District Court, Central Division, granting intervenor/respondent Mutual Mortgage Services, Inc., (Mutual) a preliminary injunction as to a lis pendens recorded by Myers against certain real property in Salt Lake County, State of Utah.

OPINIONS BELOW

The Tenth Circuit panel decision affirming the district court's grant of preliminary injunction is not reported; it is reprinted at Appendix 1-6.

RULES AND STATUTES IMPLICATED

The specific constitutional provisions, statutes, rules, etc. implicated in petitioner's case, reprinted at Appendix 15-19, are §§ 1., 2., and 3., Art. VIII, Utah Constitution; § 1., Amend. XIV, U.S. Constitution; 28 USC 1343(3); 28 USC § 1257, (a) and (b); 42 USC § 1983 (1996).

JURISDICTION

The panel decision of the United States Court of Appeals for the Tenth Circuit is dated July 14, 1998. Petitioner filed a petition for panel rehearing and for rehearing en banc which were denied on August 31, 1998.

The petition is timely, having been filed within 90 days from the denial of the petition. Jurisdiction is present under 28 USC § 1254(1).

STATEMENT OF THE CASE

In State court proceedings undertaken in 1996 Mutual sought to judicially foreclose a trust deed; petitioner was a party defendant in the proceedings. Mutual received the trust deed by assignment from the original beneficiary CTX Financial Corporation. The trustor is Rattlin Gold, Inc. [In order for a claim to be barred by res judicata, both the prior claim and the current claim must involve the same parties, their privies, or *assignees. Fitzgerald v. Corbett,* 793 P.2d 356, 359 (Utah 1990).]

In a prior action commenced in 1991 in the same court, the trust deed was adjudged dismissed, with prejudice, by final judgment entered July 16, 1992 [para. 5 of the judgment, see Exhibits to Amended Complaint, Appendix 34, "[a]ll claims by plaintiff CTX Financial Corporation against defendant Rattlin Gold, Inc. are hereby dismissed with prejudice."] In both actions the parties are the same, the claims are the same, and a final judgment on the merits was entered in the 1991 action. [The fact that the claim in the earlier action was *dismissed with prejudice* does not nullify res judicata application, as such constitutes litigation on the merits. *Steiner v. State,* 495 P.2d 809 (Utah 1972) and *Ringwood v. Foreign Auto Works, Inc.,* 786 P.2d 1350 (Utah App. 1990.)]

In the first action [1991] the attorney for CTX and Mutual, in a document filed with the court, referred to

the trust deed [see exhibits to Amended Complaint, Appendix 27-31], and trust deed note, as CTX's claims. The trust deed would qualify as a "claim" under Utah law (see *John Deere Co. v. A. & H. Equipment, Inc.*, 876 P.2d 880 (Utah App. 1994), p. 884, fn. 6).

Res judicata is a firmly rooted rule of fundamental and substantial justice. See cases cited in *Kale v. Combined Ins. Co. of America*, 736 F.Supp. 1183 (D.Mass. 1990). In the state trial court Myers moved the trial court for summary judgment that the later, 1996, action was barred by the final judgment dismissing with prejudice the trust deed claim. The motion was denied. Mutual's motion for summary judgment foreclosing the trust deed was granted. Mutual's motion was opposed by Myers on res judicata grounds. Myers appealed the judgment to the Utah Supreme Court; the case was transferred to the Utah Court of Appeals which affirmed the trial court's grant of Mutual's motion for summary judgment and the denial of Myers' motion for summary judgment. Myers' application to the Utah Supreme Court for writ of certiorari was denied. [Appendix 36] The Utah Supreme Court's determination refusing to grant certiorari was not a final judgment within 28 USC § 1257. *Arceneaux v. State of La.*, 84 SCt 777, 376 US 336, 11 LEd2d 750 (1964); *Hammerstein v. Superior Court of Cal.*, 72 SCt 820, 341 US 491, 95 LEd 1135, rehearing denied 72 SCt 21, 342 US 843, 96 LEd (1951).

This action was initiated by Myers in the US District Court, Utah, for declaratory relief under 42 USC § 1983 with jurisdiction based on 28 USC § 1343(3). *Pulliam v. Allen*, 466 US 522, 80 LEd 2d 565, 104 SCt 1970 (1984). Mutual was permitted to intervene and was granted a preliminary injunction from which Myers appealed to the

Tenth Circuit Court of Appeals. In its order granting preliminary injunction, and findings and conclusions thereon, the district court impermissibly recast Myers' complaint in effect to exclude the facts which formed the basis for Myers' claim of res judicata and, as a consequence, none of the elements to establish the res judicata claim were present, i.e., with the complaint as recast by the district court, neither the parties nor the claims were the same, and, therefore, no final judgment. See page 2, of the district court's Order of November 25, 1997, Appendix 9, and compare the allegations of the last paragraph of page 2 with the allegations of the Amended Complaint, at page 2, para. 5., Appendix 21-22. The complaint was amended to add allegations establishing "injury in fact;" otherwise, the allegations of the amended complaint track the allegations of the opening complaint. The district court's impermissible recasting of the complaint was brought to the attention of the hearing panel in the appeal of the order granting preliminary injunction but no reaction was forthcoming. The upshot of the recasting was that inasmuch as there was no res judicata because of the recasting, there was no fundamental right that was abridged to receive protection under the 14th Amendment, and therefore no jurisdiction in the court of appeals to apply 28 USC § 1257.

In 1996, by Act of Congress, there was inserted in § 1983 the following:", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." There are no limitations on the district court's jurisdiction in § 1983 cases

with jurisdiction found in 28 USC § 1343(3) insofar as *Pulliam* is concerned where declaratory relief is requested; *Pulliam* is a later case than *Feldman*; *Feldman* involved the District of Columbia Court of Appeals, the highest court of the state under 28 USC § 1257(b). In the instant case there is no judgment or decree rendered by the Utah Supreme Court, the highest court of that state [Appendix 36] to review; besides, these are not "review" proceedings; they are proceedings against a judicial officer to have an act or omission taken in such judicial officer's judicial capacity declared unconstitutional and void under the Fourteenth Amendment to the US Constitution. Amended § 1983 fully contemplates and authorizes this.

At the time of the Tenth Circuit Court's decision, there was a FRCiP 12(b)(6) motion pending in the trial court; the motion was heard and granted on August 25, 1998. The reason given by the district court judge for granting the motion was that " . . . I believe that I am going to grant the defendant's motion to dismiss. I find that in essence, Mr. Myers, what your action is is a challenge to a state court decision. And the authority to review the constitutionality of final state court judgments is committed by statute to the Supreme Court and to the Supreme Court alone. I simply believe I do not have jurisdiction and, therefore, I'm going to grant the motion to dismiss. . . . " Of course all of this is taken from the court of appeals' decision assailed in these proceedings. There is an appeal pending from the order granting 12(b)(6) dismissal; the briefs are due in mid-December.

REASONS FOR GRANTING THE WRIT

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950) the Court held that a cause of action is a species of property protected by the Due Process clauses of the US Constitution and would be protected from federal interference under the Fifth Amendment. There is a substantive due process violation present in the court of appeals decision of July 14, 1998 and in the decisions of the district court on the preliminary injunction issue as well as on the 12(b)(6) motion; they deprive petitioner of a very valuable cause of action under 42 USC § 1983 (1996) and therefore depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The court of appeals' decision also has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court, as previously explained.

CONCLUSION

For the reasons stated, petitioner respectfully petitions this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MORRIS MYERS, Plaintiff-Appellant, v. THIRD JUDICIAL DISTRICT COURT; SALT LAKE COUNTY; STATE OF UTAH; WILLIAM B. BOHLING, Judge, Third Judicial District Court, Defendants, and MUTUAL MORTGAGE SERVICES, Defendant-Intervenor-Appellee.	)	No. 97-4201 (D.C. No. 97-CV-822-C) (D. Utah)

ORDER AND JUDGMENT*

(Filed Jul. 14, 1998)

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **TACHA** and **McKAY**, Circuit Judges, and **BROWN**,** Senior District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Morris Myers (Meyers [sic]) brought an action in the United States District Court for the District of Utah alleging violations of his civil rights pursuant to 42 U.S.C. § 1983. He seeks a "declaration" that a 1997 decree of foreclosure and judgment entered by the defendant state district judge "impinges plaintiff's due process rights under the 14th Amendment." Plaintiff's Affidavit/Opposition to Intervenor's Motion for Preliminary Injunction at 1. In connection with that action, he filed a notice of *lis pendens* on certain property of Mutual Mortgage Services, Inc. (Mutual), a nonparty to the action. After discovering the *lis pendens* while negotiating the sale of the property, Mutual sought permission to intervene and for a temporary restraining order (TRO) and preliminary injunction.

Following a hearing, the motions to intervene and for a TRO were granted; the preliminary injunction was entered shortly thereafter. Myers has timely appealed the

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** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

grant of the preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

> The district court may grant a preliminary injunction if the party seeking it shows: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) proof that the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) that the injunction, if issued, will not be adverse to the public interest.

Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Servs., 31 F.3d 1536, 1542-43 (10th Cir. 1994) (citing *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1487 (10th Cir. 1993).

We review the district court's grant of a preliminary injunction under an abuse of discretion standard. *See Elam Constr., Inc. v. RTD*, 129 F.3d 1343, 1346 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1363 (1998) (citing *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995). *See also SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) ("We will not set aside a preliminary injunction unless the district court abuses its discretion, commits an error of law, or is clearly erroneous in its preliminary factual findings. . . . " (citations omitted)). We have long held that " '[a]n abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling.' " *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997) (quotation omitted).

The district court found that Mutual's likelihood of success on the merits was "overwhelming" and that the potential harm if the injunction were not granted would be "substantial." The court also determined that Myers would suffer no harm because there was "no evidence in the record that Myers ever even had an ownership interest in the subject property." Intervenor/Appellee's Br., tab 2 at 5. Finally, the court decided that the public interest weighed in favor of Mutual because Myers "recorded the *lis pendens* on the property of a corporation not even named as a party to this action and in a case where the only claims deal with the procedures employed in the state courts." *Id.* Being fully informed of the factual background of this case, including the Utah state and appellate courts' rejection of Myers' identical "res judicata" arguments, we uphold the district court's determination that Mutual satisfied the requirements for obtaining a preliminary injunction for substantially the reasons stated in its order of November 25, 1997.

We turn now to Mutual's motion for damages made pursuant to Fed. R. App. P. 38. Under Rule 38, a court of appeals is authorized to award "just damages, including attorney's fees, and single or double costs if the court determines that an appeal is frivolous or brought for purposes of delay." *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987) (citations omitted). "An appeal is frivolous when 'the result is obvious or the appellant's arguments of error are wholly without merit.' " *Id.* (citations omitted).

Plaintiff has had notice of the motion. *See Braley*, 832 F.2d at 1515 (noting requirements of notice). In response, he states that "[a]n appeal is frivolous only if the facts

alleged arise to the level of the irrational or the wholly incredible; or the claim is based on an indisputably meritless legal theory," Appellant's Reply Br. at 14 (citations omitted), and that his appeal, even if not meritorious, is plainly not frivolous. He in turn asks this court to sanction Mutual an amount of $5,000 for its "frivolous motion for Rule 38 damages." *Id.*

We note that the Utah Court of Appeals has sanctioned plaintiff for raising identical arguments, holding that "[t]he present appeal is 'not grounded in fact, not warranted by existing law, [and] not based on a good faith argument to extend, modify, or reverse existing law.' " *Mutual Mortgage Servs. Inc. v. Rattlin Gold, Inc.*, No. 970175-CA (Utah Ct. App. May 22, 1997) (quoting Utah R. App. P. 33(a)). *See* Intervenor/Appellees' Br., tab 4 at 2-3.

Myers has not adequately informed this court how the district court abused its discretion in granting the injunction, except to argue that the order is "void as being in violation of Myers' due process rights under the Fourteenth Amendment," Appellant's Reply Br. at 13, and to assert that the district court's reliance on the decision of the Utah Court of Appeals was improper, Appellant's Reply Br. at 11. He also contends that the district court misapprehended the "true basis for the res judicata claim." Appellant's Reply Br., p. 7. He in essence simply repeats arguments he has been previously warned are without legal merit and continues his attack on the judgment of the Utah Court of Appeals. *See Olson v. Coleman*, 997 F.2d 726, 728 (10th Cir. 1993) (finding appeal frivolous for failing to present any reasonable argument that the district court erred in its disposition); *Barnett v. United States*, No. 93-6085, 1993 WL 349417 at **2 (10th Cir. Sept.

14, 1993) (finding appeal frivolous where appellant made no good faith effort to demonstrate error in district court's decision).

This action is in essence a challenge to a state court decision with which plaintiff disagrees, and over which federal courts lack jurisdiction. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986). This appeal is both frivolous and abusive.

Accordingly, we GRANT Mutual's motion and award Mutual double costs and damages against Myers in the amount of $1,000. The order of the district court granting Mutual's motion for a preliminary injunction is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Wesley E. Brown
Senior District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MORRIS MYERS, Plaintiff,	:	ORDER
vs.	:	
THIRD JUDICIAL DISTRICT COURT, et al., Defendants.	:	(Filed Nov. 25, 1997)
	:	Civil No. 2:97-CV-822

This matter is before the court on the defendant Mutual Mortgage Service, Inc.'s motion for a preliminary injunction. The court heard argument in this matter on Thursday, November 20, 1997 at which time plaintiff appeared *pro se*, and Mutual was represented by Mr. David Wright. Following the hearing, plaintiff was ordered to submit supplemental briefing, a process which is now completed. Now being duly advised, the court enters the following order based upon the applicable law, oral argument, and written submissions of the parties.

Background

On July 16, 1992, the Honorable Judge J. Dennis Frederick, sitting in the Third Judicial District Court for Salt Lake County, entered his judgment in the case *CTX Financial v. Rattlin Gold, Inc., et al.*, No. 910902091 (3rd District, July 17, 1992). As part of that judgment, Judge

Frederick held that a certain trust deed for property at American Towers, dated December 12, 1989, naming Rattlin Gold as trustor and Stan Caldwell (the president of Rattlin Gold) as beneficiary, recorded in book no. 6296, and page no. 1238, as entry no. 5036151, was null and void. This trust deed is hereinafter referred to as the "Rattlin-Caldwell Trust Deed."

Nearly five years later, on January 3, 1997, the Honorable Judge William B. Bohling, sitting in the Third Judicial District for Salt Lake County, entered his judgment of foreclosure in the case of *Mutual Mortgage Services, Inc. v. Rattling* [sic] *Gold, Inc., et al.*, No. 960901183 (3rd District, January 3. 1997). In his judgment, Judge Bohling determined that Rattlin Gold was liable to Mutual Mortgage under a note and trust deed in the amount of $752,039.98 and that the property securing the debt should be sold at public auction to satisfy the judgment.

Although this case concerned the same American Towers property as the *CTX Financial* case, Mutual's interest in the property was based upon an entirely different trust deed. This other trust deed, naming Rattlin Gold as trustor and CTX Financial as beneficiary, was recorded in the Office of the Salt Lake County Recorder on July 6, 1990 in Book 6234, beginning at Page 2503 as entry no. 4937994. This trust deed is hereinafter referred to as the "Rattlin-CTX Trust Deed. CTX Financial subsequently assigned its interest in the trust deed to Mutual Mortgage Services, Inc., an assignment recorded as entry no. 5014737.

In the *Mutual Mortgage* proceedings, then-defendant Morris Meyers [sic] asserted that Judge Frederick's decision in *CTX Financial*, declaring the Rattlin-Caldwell trust deed null and void, was *res judicata* as to the validity of the Rattlin-CTX trust deed relied upon by Mutual Mortgage. Judge Bohling rejected this line of argument and entered judgment for Mutual Mortgage.

Meyers [sic] appealed Judge Bohling's decision to the Utah Court of Appeals. In a *per curiam* opinion, the Court of Appeals also rejected Meyers's [sic] *res judicata* argument and imposed sanctions for a frivolous appeal:

> That was no genuine dispute of the material facts establishing a default under the note and trust deed. Appellants contend that Mutual is precluded as a matter of law from asserting its claims as a result of prior litigation.
>
> The litigation between CTX Finanical and Rattlin Gold ("the CTX Action") did not adjudicate claims under the promissory note and trust deed that are the subject of this case. Accordingly, the judgment in the CTX Action dismissing CTX Financial's claims against Rattlin Gold did not apply to claims under the note and trust deed that are the subject of this case. Similarly, we conclude Mutual's claims in this case are not precluded by res judicata, judicial estoppel, or the one-action rule. The CTX Action did not adjudicate the claims asserted in this case because it was based upon an entirely different obligation between CTX Financial and Rattlin Gold. . . .
>
> Under the circumstances, we determine this appeal is frivolous within the meaning of Rule 33. . . .

Mutual Mortgage Services, Inc. v. Rattling [sic] *Gold, Inc.*, No. 970175-CA, slip op. at 2 (Utah Ct. App. May 22, 1997).

In the present action, now-plaintiff Morris Meyers [sic] asserts that Judge Bohling deprived him of his constitutional rights when Judge Bohling refused to recognize Meyers's [sic] *res judicata* argument. Presumably to prevent Mutual from selling the American Towers property which it obtained by Judge Bohling's decree of foreclosure, plaintiff Meyers [sic] has also recorded a *lis pendens* on the property. Plaintiff did so even though Mutual, the current owner of the property, was not named as a party to the present action.

After intervening in plaintiff Meyers's [sic] lawsuit against Judge Bohling, defendant Mutual filed the present motion for a preliminary injunction removing the *lis pendens*. In support thereof, Mutual alleges that its current opportunity to sell the American Towers property will be lost if the *lis pendens* is not removed and that Mutual will therefore be unable to meet certain financial obligations using the proceeds of that sale.

Discussion

The standard for the issuance of a preliminary injunction is not in dispute. In order for a preliminary injunction to issue, this court must find that: (1) Mutual, the moving party, will suffer irreparable injury unless the injunction issues; (2) the threatened injury to Mutual outweighs whatever damage the proposed injunction may cause plaintiff; (3) the injunction, if issued, would not be adverse to the public interest; and (4) that there is

a substantial likelihood that Mutual will prevail on the merits.

The potential harm to Mutual is substantial. If it is unable to sell the property because of the *lis pendens*, or if it is required to place the proceeds of the sale, approximately $750,000, in escrow pending the outcome of this litigation, it will be unable to meet certain of its financial obligations.

Mutual's likelihood of success is overwhelming. Plaintiffs claim will likely be barred by doctrines of immunity under the Eleventh Amendment, by abstention doctrines that prevent this court from sitting as "super-appellate" court above the Third District Court and the Utah Court of Appeals, and, ironically, by the doctrine of *res judicata*. Plaintiff apparently has already litigated this issue fully and fairly, in two state courts and therefore may be prevented from litigating those issues again here. Even if plaintiff did not face such hurdles, it appears to this court that Judge Bohling and the Utah Court of Appeals were probably correct on the merits, *i.e.*, the *CTX Financial* decision did not actually adjudicate the validity of Mutual's trust deed.

It is also the court's belief that the public interest weighs in favor of an injunction removing the *lis pendens* rather than against it. Plaintiff recorded the *lis pendens* on the property of a corporation not even named as a party to this action and in a case where the only claims deal with the procedures employed in the state courts. The disposition of the American Towers property is not directly as issue in this case and so a *lis pendens*, which

gives notice of an action affecting real property, is likely an inappropriate device here.

Finally, the court is not certain what harm Myers suffered, if any, from Judge Bohling's decision to allow Mutual to foreclose on the property. This is no evidence in the record that Myers ever even had an ownership interest in the subject property. As both Judge Bohling and Judge Frederick decided, the true owner of the property prior to Mutual's foreclosure, was Rattlin Gold, a Nevada corporation.

Mutual's motion for a preliminary injunction removing the *lis pendens* on the subject property is therefore GRANTED.

Furthermore, the court releases from trust any funds that may have been realized by Mutual's sale of the subject property and held pursuant to the court's order of November 20, 1997. Based upon the virtual impossibility of plaintiff prevailing on the merits, the court waives the bond requirement of Fed. R. Civ. P. 65(c). *Coquina Oil Corporation v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

SO ORDERED this 25 day of November, 1997.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MORRIS MYERS, Plaintiff-Appellant, v. THIRD JUDICIAL DISTRICT COURT; SALT LAKE COUNTY; STATE OF UTAH; WILLIAM B. BOHLING, Judge, Third Judicial District, Defendants, and MUTUAL MORTGAGE SERVICES, Defendant-Intervenor-Appellee.	)	No. 97-4201

ORDER

Filed August 31, 1998

Before **TACHA** and **McKAY**, Circuit Judges, and **BROWN**,* Senior District Judge.

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* Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ L. Bahzano
Deputy Clerk

* * *

CONSTITUTION OF UTAH, Art VIII

Section 1. [Judicial powers – Courts.]

The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

1984 (2nd S.S.)

Sec. 2. [Supreme court – Chief justice – Declaring law unconstitutional – Justice unable to participate.]

The Supreme Court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the Supreme Court as provided by statute. The chief justice may resign as chief justice without resigning from the Supreme Court. The Supreme Court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court. If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief

justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

1984 (2nd S.S.)

Sec. 3 [Jurisdiction of Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

1984 (2d S.S.)

* * *

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. [Citizenship – Due process of law – Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section –

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be

granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH

CENTRAL DIVISION

MORRIS MYERS,

Plaintiff,

V.

THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, and WILLIAM B. BOHLING, judge of said last named court,

Defendants.

AMENDED COMPLAINT

(Filed March 23, 1998)

Civ. No. 2:97 CV 822C

Magistrate Judge Boyce

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1. Jurisdiction is based upon Title 28, U.S.C. § 1343(3), Title 28, U.S.C. § 2201, and Title 42, U.S.C. § 1983.

2. On August 5, 1994, Chad Van Setters, as trustor, executed and delivered to Rattlin Gold, Inc., a Nevada Corporation, beneficiary, a trust deed securing a trust deed note for $850,000.00. Said trust deed was recorded August 5, 1994 as Entry No. 5892672, in Book 6995 Page(s) 2074, Salt Lake County Recorder and described the real property hereafter described. Plaintiff herein is the present owner and holder of said trust deed.

Said plaintiff is also the present owner and holder of 1,333,334 shares of the capital stock of said Rattlin Gold, Inc., a Nevada corporation, represented in part by certificates numbered 1002, 1004, 1005, 1006 and 1007.

3. On July 6, 1990, Rattlin Gold, Inc., a Nevada corporation, executed and delivered to CTX Financial Corporation, a Utah corporation, a trust deed note and trust deed wherein is described the following real property in Salt Lake County, State of Utah, to-wit:

> Condominium United No. R. 2701-N AMERICAN TOWERS, A CONDOMINIUM PROJECT, together with and including an appurtenant undivided interest in Common Areas, all as established and described in the Declaration of Condominium and Record of Survey Map pertaining to said Project, both of which were recorded in the office of the County Records of Salt Lake County, State of Utah, on July 30, 1982 as Entry No. 3697665 and 3697666, respectively, in Book 5400, commencing at page 292 through 377 and in Book 82-7 of Plats at page 64.

On January 20, 1991, CTX Financial Corporation assigned said trust deed recorded in Book 6234, beginning at page 2503, to Mutual Mortgage Services, Inc., a Utah corporation.

4. Said condominium was the only asset of said Rattlin Gold, Inc.

5. In 1991, after said assignment by said CTX Financial to said Mutual Mortgage of said trust deed, said CTX Financial Corporation, as plaintiff, commenced an action in said defendant court, the Hon. J. Dennis Frederick, presiding, against said Rattlin Gold, Inc., Stan Caldwell, John Patrick Stovall, and Karl Seljaas [Civil No. 910902091]. In said last described action the attorneys for plaintiff CTX Financial filed a document entitled PLAINTIFF' MEMORANDUM IN OPPOSITION TO MOTION to

DISCHARGE RECEIVER dated and filed February 5, 1992 [see Exhibit 1], where it was clearly stated that said trust deed note and trust deed to CTX Financial were *claims* in favor of CTX Financial. On July 16, 1992, a final judgment was entered in said Civil No. 910902091 paragraph 5, of which said judgment dismissed with prejudice said trust deed and trust deed note [see Exhibit 2].

5. Notwithstanding said final judgment of dismissal with prejudice, in 1996 said Mutual Mortgage commenced an action in said defendant court, defendant Judge William B. Bohling presiding, Civil No. 960901183CV, against defendants Rattlin Gold, Inc., a Nevada corporation; John P. Stovall, an individual; and Morris Myers, who is one and the same Morris Myers as the plaintiff herein, to foreclose said trust deed. In said last described action plaintiff herein, Morris Myers moved the court for judgment that the said foreclosure action was barred by res judicata based upon said final judgment of dismissal with prejudice in said 9109020, and otherwise defended the proceedings on principles of res judicata; said motion and defense based upon res judicata were rejected by the court and on January 3, 1997, a decree of foreclosure and judgment whereby said trust deed was foreclosed was entered by defendant judge in defendant court. Appeals from said decree of foreclosure and judgment, as well as from the order denying plaintiff's motion for summary judgment, were perfected but were unavailing. True copies of said trust deed and trust deed note are appended to Exhibit 1 attached hereto.

6. By reason of the denial to plaintiff of the defense of ares judicata by said decree of foreclosure and judgment, and order denying plaintiff's motion for judgment,

plaintiff having established the elements of the ares judicata doctrine in said proceedings, as hereinabove mentioned and described, plaintiff was denied fundamental and substantial justice, a fundamental right, and, consequently, due process of law as guaranteed to plaintiff under the Fourteenth Amendment to the U.S. Const.

7. On September 1, 1994 there was owing on the Van Setters trust deed as principal, the sum of $849,975.00; interest accrues at the rate of 9% per annum except there is a 5% late payment due on any payment past due for 15 days or more. The lien of said Van Setters trust deed is prior and superior to the lien of said decree of foreclosure which is void as being in violation of plaintiff's due process rights under the Fourteenth Amendment.

8. Under the laws of the State of Nevada plaintiff, as a shareholder in Rattlin Gold, Inc., a Nevada corporation, is entitled to a ratable distributive share of the assets of said corporation upon dissolution of said corporation. By reason of said decree of foreclosure in an amount exceeding the value of the sole asset of said Rattlin Gold, Inc., there is no resulting distributive share, ratable or otherwise.

WHEREFORE, plaintiff prays that the Court enter its declaratory judgment and decree declaring the said decree of foreclosure and judgment in said state court proceedings [Civil No. 960901183CV] is in violation of plaintiff's due process rights under the Fourteenth

Amendment to the United States Constitution and therefore is unconstitutional and void.

DATED March 22, 1998.

/s/ Morris Myers
MORRIS MYERS
Plaintiff pro se
Residence Address:
400 East Creekside Circle #E
Murray, Utah 84107

Post Office Address:
Post Office Box 761
Midvale, Utah 84067

EXHIBIT 1

ELLEN MAYCOCK - 2131
STEVEN G. LOOSLE - 4874
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A Professional Corporation
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50 West Broadway
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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CTX FINANCIAL CORPORATION, Plaintiff, vs. RATTLIN GOLD, INC., STAN CALDWELL; JOHN PATRICK STOVALL; and KARL SELJAAS, Defendants.	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISCHARGE RECEIVER Civil No. 91 090 2091 CV Judge J. Dennis Frederick

Defendant Karl Seljaas ("Seljaas") has filed a motion to discharge the receiver appointed by this court for defendant Rattlin Gold, Inc. ("Rattlin") in July of 1991. This memorandum is in opposition to that motion.

Plaintiff CTX Financial Corporation ("CTX") asserts that it is both the majority shareholder of Rattlin, having foreclosed on its security interest in a majority of the stock, and a creditor of Rattlin with a security interest in the condominium owned by Rattlin (Exhibits "A" and "B"). Defendants Stan Caldwell ("Caldwell") and Seljaas dispute CTX's claims. The court appointed a receiver in this matter because it found that Rattlin's only real asset is that American Towers condominium, and that Rattlin was in danger of losing the condominium for failure to pay property taxes and condominium owner's fees. Nothing has changed since the receiver was appointed.

CTX is informed that, since the receiver was appointed in July of 1991, he has attempted to remove Caldwell from the condominium so that it could be rented for sufficient amounts to pay the condominium owner's fees and property taxes. Caldwell has so far successfully resisted those attempts. CTX is further informed that the receiver has filed an unlawful detainer action to remove Caldwell from the condominium.

It is obvious that the motion to discharge that receiver is nothing more than an additional attempt on Caldwell's part to continue living in the condominium without paying rent and without paying the obligations associated with the condominium, all to the detriment of Rattlin. As the majority shareholder of Rattlin and a creditor with a security interest in the condominium, CTX

supports the receiver's efforts to preserve the asset. The motion to discharge the receiver should be denied.

DATED this 5th day of February, 1992.

KRUSE, LANDA & MAYCOCK
A Professional Corporation
Eighth Floor, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101

By /s/ Ellen Maycock
ELLEN MAYCOCK
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I am employed by the law firm of Kruse, Landa & Maycock and further certify that on February 5, 1992, I mailed a true and correct copy of the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISCHARGE RECEIVER in the United States mail, first class postage prepaid, to each of the following:

Richard J. Leedy, Esq.
170 South Main Street, Suite 1120
Salt Lake City, Utah 84101

Michael F. Olmstead, Esq.
385 – 24th Street, Suite 714
Ogden, Utah 84401

David T. Aagard, Esq.
1245 East Brickyard Road, Suite 530
Salt Lake City, Utah 84106

Kent H. Collins, Esq.
Collins & Kelly
240 East Morris Avenue
Salt Lake City, Utah 84115-3200

/s Vicki Stevens

EXHIBIT "A"

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

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$35,000.00 SALT LAKE CITY, UTAH

July 6, 1990

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of the sum of THIRTY-FIVE THOUSAND & 00/100 DOLLARS ($35,000.00), together with interest from July 6, 1990 at the rate of forty-two per cent (42.000%) per annum on the unpaid principal, said principal and interest payable as follows:

ONE THOUSAND TWO HUNDRED TWENTY-FIVE & 00/100 $1,225.00 each month commencing on July 6, 1990 and monthly thereafter on the 6th day of each and every month. In addition to the above monthly payments, borrower agrees to make a balloon payment on or before

the 6th day of July, 1991 in the amount of $36,225.00.

The monthly payment of interest to be late if not received 10 days from it's due date, i.e., the 16th of each month. If late, then default occurs at which point the entire unpaid balance will accrue a additional 2% per month until default is cured.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal.

If default occurs in the payment of said installments of principal and interest or any part hereof, or in the performance of an agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder

EXHIBIT "B"

WHEN RECORDED MAIL TO:
CTX FINANCIAL
2875 SOUTH MAIN STREET #101
SALT LAKE CITY, UTAH

TRUST DEED

THIS TRUST DEED is made this date, July 6, 1990, between

RATTLIN GOLD, INC., A NEVADA CORP.

, as Trustor.

METRO NATIONAL TITLE COMPANY, as Trustee, and

CTX FINANCIAL, A UTAH CORPORATION

, as beneficiary.

Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described property situated in SALT LAKE County, Utah:

Condominium Unit No. R-2701-N AMERICAN TOWERS, A CONDOMINIUM PROJECT, together with and including an appurtenant undivided interest in the Common Areas, all as established and described in the Declaration of Condominium and Record of Survey Map pertaining to said Project, both of which were recorded in the office of the County Records of Salt Lake County, State of Utah, on July 30, 1982 as Entry No. 3697665 and 3697666, respectively in Book 5400, commencing at page 292 through 377 and in Book 82-7 of Plats at page 64.

Together with all buildings, fixtures and improvements thereof and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto now or hereafter used or enjoyed with said property, or any part thereof;

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of $35,000.00, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any sums expended or advanced by Beneficiary to protect the security hereof.

Trustor agrees to pay all taxes and assessments on the above property to pay all charges and assessments on water or water stock used on or with said property, not to commit waste, to maintain adequate fire insurance on improvements on said property, to pay all costs and expenses of collection (including Trustee's and attorney's fees in event of default in payment of the indebtedness secured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee hereunder, including a reconveyance hereof.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

The officers who sign this trust deed hereby certify that this trust deed and the transfer represented thereby was duly authorized under a resolution duly adopted by

the board of directors of the trustor at a lawful meeting duly held and attended by a quorum.

RATTLIN, GOLD, INC.
A NEVADA CORP.

/s/ Stan L. Caldwell
STAN L. CALDWELL,
PRESIDENT

STATE OF UTAH, County of SALT LAKE) ss:

On this date, July 6, 1990 personally appeared before me STAN L. CALDWELL who being by me duly sworn did say, that he is the PRESIDENT, of Rattlin Gold, Inc., a Nevada Corp. the corporation that executed the above the foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution of its board of directors) and said STAN L. CALDWELL acknowledged to me that said corporation executed the same.

/s/ Tiffany Schone
NOTARY PUBLIC [SEAL]

My commission expires: August 11, 1991
Residing in: SALT LAKE

*NOTE: Trustee must be a member of the Utah State Bar: a bank, building and loan association or savings and loan association authorized to do business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

EXHIBIT "2"

ELLEN MAYCOCK - 2131
KRUSE, LANDA & MAYCOCK
A Professional Corporation
Attorneys for Plaintiff
Eighth Floor, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 531-7090

IN THE THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

CTX FINANCIAL CORPORATION, Plaintiff, vs. RATTLIN GOLD, INC., STAN CALDWELL; JOHN PATRICK STOVALL; and KARL SELJAAS, Defendants.	**JUDGMENT** 2175881 7-17-92 - 8.09 am Civil No. 91 090 2091 CV Judge J. Dennis Frederick

The above entitled matter came on for trial on June 2, 1992, pursuant to notice, the Honorable J. Dennis Frederick presiding. Plaintiff was represented by its counsel, Ellen Maycock. Kim Stevenson, as court appointed receiver for Rattlin Gold, Inc., was represented by his

counsel, Kent H. Collins. Defendant John Patrick Stovall was represented by Michael F. Olmstead. Defendants Stan Caldwell and Karl Seljaas represented themselves. The court having heard the testimony of witnesses, received exhibits, heard arguments of counsel and the parties, having issued its ruling on June 4, 1992, and having made and entered findings of fact and conclusions of law, NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The 22,875,000 shares of stock in defendant Rattlin Gold, Inc., purportedly issued in March of 1991, are void and the certificates are canceled.

2. The trust deed dated December 12, 1989, naming defendant Rattlin Gold, Inc. as trustor and defendant Stan Caldwell as beneficiary, recorded March 8, 1991, as entry no. 5036151, book no. 6296, and page no. 1238, is void and of no effect. Defendant Stan Caldwell is ordered to execute a reconveyance in order to remove any cloud on the title to the condominium more particularly described as follows:

> Condominium Unit No. R-2701-N AMERICAN TOWERS, A CONDOMINIUM PROJECT, together with and including an appurtenant undivided interest in the Common Areas, all as established and described in the Declaration of Condominium and Record of Survey Map pertaining to said Project, both of which were recorded in the office of the County Recorder of Salt Lake County, State of Utah, on July 30, 1982, as Entry Nos. 3697665 and 3697666, respectively, in Book 5400, commencing at page 292 through 377 and in Book 82-7 of Plats at page 64.

Together with the furniture and furnishings presently contained therein as is in their present condition.

3. Plaintiff CTX Financial Corporation is declared to be the owner of 4,000,000 shares of defendant Rattlin Gold, Inc., represented by certificate no. 1002 in the amount of 1,250,000 shares, certificate no. 1004 in the amount of 1,125,000 shares, certificate no. 1005 in the amount of 750,000 shares, certificate no. 1006 in the amount of 125,000 shares, and certificate no. 1007 in the amount of 750,000 shares.

4. Judgment is hereby entered against defendant Stan Caldwell for attorneys' fees in the amount of $28,324.00.

5. All claims by plaintiff CTX Financial Corporation against defendant Rattlin Gold, Inc. are hereby dismissed with prejudice.

6. Judgment is hereby entered against defendant Rattlin Gold, Inc. in the amount of $29,662.30, representing the fees and expenses of the receiver and the attorney's fees and costs of the receiver.

7. Plaintiff CTX Financial Corporation is entitled to a judgment against defendant Stan Caldwell in the amount of $29,662.30, representing the fees and expenses of the receiver and the attorney's fees and costs of the receiver.

DATED this 16th day of July, 1992.

BY THE COURT:

/s/ J. Dennis Frederick
JUDGE
J. DENNIS FREDERICK

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT to the following, postage prepaid, this 7th day of July, 1992:

Michael F. Olmstead, Esq.
2650 Washington Blvd.
Ogden, Utah 84401

Kent H. Collins, Esq.
Kimball, Parr, Waddoups, Brown & Gee
240 East Morris Avenue
Salt Lake City, Utah 84115-3200

Mr. Stan Caldwell
48 West 300 South, #2701N
Salt Lake City, Utah 84101

Mr. Karl Seljaas
c/o Stan Caldwell
48 West 300 South, #2701N
Salt Lake City, Utah 84101

/s/ Vickie Stevens

IN THE SUPREME COURT OF THE STATE OF UTAH

Mutual Mortgage Services, Inc.,

Plaintiff and Respondent,

v.

Rattlin Gold, Inc., a Nevada corporation; John P. Stovall, and *Morris Myers,*

Defendants and Petitioner.

No. 970354
970175-CA
910902091CV

The Petition for Writ of Certiorari is denied.

10/7/97
Date

/s/ Michael D. Zimmerman
Michael D. Zimmerman
Chief Justice

For The Court